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RE: PETITION FOR DECLARATORY RULNG
BY: KATRIN R. CHANDLER, BETTY J. LANNEN, POLLY REX,
JOSEPH MILLER, and THE CLARK FORK COALITION, Petitioners

DNRC,

Enclosed please find the STATEMENT OF POSITION of Mountain Water Company on the PETITION FOR DECLARATORY RULING of the above referenced petitioners. In compliance with the Department's Public Notice on this matter, Mountain Water Company, through its attorneys, hereby provides its address, and the address and signature of its attorneys who prepared its STATEMENT OF POSITION on a separate sheet of paper.

DATED this 30 day of April, 2010.

By:



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**BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

* * * * *

**KATRIN R. CHANDLER, BETTY J.
LANNEN, POLLY REX, JOSEPH
MILLER, and THE CLARK FORK
COALITION,**

Petitioners

**STATEMENT OF POSITION
OF
MOUNTAIN WATER COMPANY
ON
PETITION FOR DECLARATORY
RULING,**

Interested Person

I. Introduction

Mountain Water Company (MWC), Missoula's municipal water supplier, joins in the petition submitted by Katrin Chandler et al. in favor of a declaratory ruling and amendment of the definition of "combined appropriation" found in Admin. R. Mont. 36.12.101(13). MWC concurs in the legal arguments made by Chandler, that the rule promulgated by DNRC exceeds the scope and intent of the relevant Montana Code. MWC will therefore not rehash these legal arguments.

However, MWC's perspective on the use of ground water and the impacts of exempt wells differs slightly from those of the original petitioners and therefore MWC files this supplemental brief.

Chandler's petition seeks a declaration of invalidity under Mont. Code Ann. § 2-4-501 and an amendment of the rule under § 2-4-315. A party may seek a declaratory ruling from the agency when doubt exists as to how a statute or rule administered by an agency affects the party's legal rights. Admin.R.Mont. 1.3.226. Admin.R.Mont. 1.3.227(2)(c) requires a petition for a declaratory ruling to include "sufficient facts to show that petitioner will be affected by the requested ruling..." Likewise, Admin.R.Mont. 1.3.308(1)(a)(ii), controlling petitions to amend rules, requires "sufficient facts to show how petitioner will be affected by adoption, amendment, or repeal of the rule..." This brief demonstrates the effect of the exempt wells rule as promulgated on Mountain Water and the potential improvements associated with a modification of the rule.

II. Background on Mountain Water

Mountain Water Company provides municipal water to the Missoula community. The current system includes groundwater rights from 36 production wells, storage in eight high mountain lakes, and seven Rattlesnake Creek surface water rights. MWC's authorized place of use for these rights was consolidated from numerous individual water right places of use descriptions to a single larger projected service area in December 2003. See Ex. A. Therefore, MWC currently has authorization to provide municipal water service to the greater Missoula area by simply extending any needed piping from the current distribution system. Developers therefore have the option of paying to connect to the public system or pursuing an alternative such as exempt wells. Connecting to the current system is more or less expensive, depending on

the location of the subdivision, but avoids many of the concerns associated with procuring water, and presumably, the cost of the connection, depending on the size of the subdivision, can be readily passed on.

However, as is clear from Exhibit A, the so-called Missoula metropolitan area extends far beyond the current reach of MWC's service area. There will be development within the Missoula aquifer, which underlies the entire Missoula valley, that is too distant from the current system to economically connect to MWC's system. Under the current laws and regulations, procuring new water right permits for such developments is extremely expensive, time consuming, and uncertain; whereas new exempt well water procurements are entirely free of permit costs, are immediately available upon drilling and filing, and are 100% certain. Therefore, new developments that cannot connect to MWC's system are predominantly driven towards using exempt wells as opposed to going through the water right permitting system. Also, because connection to MWC's system comes at a cost, developments that lie within easy reach of MWC's existing distribution system can also be driven towards exempt wells, as exempt wells are essentially free for the cost of drilling, a cost that MWC cannot compete with. Many of these developments that do or will rely on exempt wells are either within MWC's service area or close by within the Missoula Valley, and tap the same Missoula Aquifer which is the source for MWC's wells. That means that exempt wells tapping the Missoula Aquifer either within or outside of MWC's service area are still accessing the same ground water source. In addition, the surface flows of the Bitterroot and Clark Fork Rivers are augmented, in part, by the aquifer. Therefore, in many, if not most situations, these exempt wells not only share a hydrologic connection with MWC's wells, but are also hydrologically connected to the Bitterroot and Clark Fork Rivers.

Another relevant fact to Mountain Water's particular situation is the location of its

service area relative to various closed basins and controlled ground water areas. In a closed basin, groundwater is only available under strict conditions requiring extensive study to determine that water is available and adverse affect to senior surface water users will not occur. Mont. Code Ann. § 85-2-360. Mountain Water's Service Area is surrounded by such closed areas. The Upper Clark Fork Basin technically begins at the confluence of the Blackfoot and Clark Fork Rivers, which is immediately east of the service area. The closed Bitterroot Basin ends at the confluence of the Bitterroot and Clark Fork Rivers, in essence just skirting the Service Area and decidedly within the confines of the aquifer. All of these closed basins either disallow further water development or require various heightened standards for obtaining water, driving the need for, or use of, exempt wells. (Estimates for complying with the various procedures and studies required to obtain a permit for a non-exempt well range from \$40,000 to well over \$100,000, not to mention whatever additional costs are attributed to any required mitigation plan and purchase of mitigation water. And, in a highly appropriated drainage such as the Clark Fork and Bitterroot drainages, additional water rights for mitigation simply may not be available at any cost.) Yet, given the hydrologic connections between these sources and the Missoula aquifer, the arbitrary distinction of allowing free water development utilizing exempt wells verses extremely expensive water development utilizing permitted wells, clearly skews development towards exempt wells, even in areas susceptible to adverse affect.

III. Issues faced by MWC due to proliferation of exempt wells

In addition to the concerns outlined in the Chandler petition, MWC faces some unique impacts due to exempt wells that are not necessarily faced by the other petitioners. These include:

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a. Special needs of municipal water supplier

As pointed out in Chandler's brief, one of the significant problems of the exemption as currently defined and applied is that there is no oversight of the completion of the wells or their use. DNRC has no way of monitoring how much water exempt wells are consuming each year. MWC, as the primary municipal supplier of Missoula, faces special challenges in planning for the future. MWC must always stay ahead of the game, to make sure that it has the capacity to provide sufficient water for the city of Missoula. Without any way of monitoring the consumption of exempt wells, though these wells draw from the same water source as MWC does, MWC's task of adequately planning for Missoula's growth becomes a dangerous guessing game. Amendment of the rule in a way that discourages uncontrolled, unenforceable, and unmonitored development on exempt wells would improve MWC's ability to serve the Missoula community into the future, better protect MWC's senior rights, and help shift future domestic development back towards public water supplies and away from private exempt wells.

In addition, MWC has a special obligation to the citizens of Missoula that make it especially attuned to the consumption of the resource. An ordinary individual public water supply user may no doubt suffer real hardship due to the additional exempted consumption of water, as the proliferation of exempt wells stresses the ground water resource, which will force public water suppliers holding water rights to incur additional expenses to deal the depleted resource, with such expenses passed on to the individual user.

b. Safe drinking water

As a municipal supplier, unlike the agricultural surface users who signed the Chandler petition, MWC has a particular obligation regarding the safety of its water supply. As noted in several sources, one of the potential dangers of the exempt well provision is the potential for contamination of the water source, both through inadequate, unmonitored drilling and well

maintenance, and through location of private individual sewer facilities associated with the developments utilizing the exempt wells.

c. MWC is not primarily a surface water user

Chandler's petition focuses on the difficulties that befall senior surface water users under the current exempt well regime. These same concerns—difficulty in making a call for water, claims of futility in response to a call, etc.—are shared by MWC, though its primary municipal supply comes from groundwater. In addition, as a groundwater user, the cause of any particular depletion to the source may be even more difficult to identify. For instance, a surface water user who irrigates out of Rattlesnake Creek can presume that any deficiency in supply is caused by a surface water use somewhere upstream in the Rattlesnake drainage. On the other hand, any pumping deficiencies identified by MWC in its ground water could be coming from almost anywhere in the aquifer, and with the recent proliferation of exempt well would likely come from numerous un-permitted users spread throughout the valley, making MWC at risk of great harm “from a thousand cuts”. Making call on a permitted ground water user is difficult enough, but making call on innumerable exempt wells is virtually impossible.

d. Exempt well development decries water as a public resource owned by Montana.

Water is a public resource owned by the State of Montana for use by Montanans. Art. IX, § 3 (3), Mont. Const. Water developments which go through the water right permitting process comply with this constitutional provision. However, exempt well developments essentially privatize water, as there are no permitting requirements or restrictions, no means for senior users to make call on the water, no monitoring of use required, and essentially no accountability. Therefore, existing and prospective water right holders are not treated equally to exempt well developers with respect to water use. In summary, Montana water right holders are

not afforded the protections of the state Constitution, or its laws, when exempt wells are allowed to proliferate to the extreme extent which has been occurring recently.

DATED this 30 day of April, 2010.

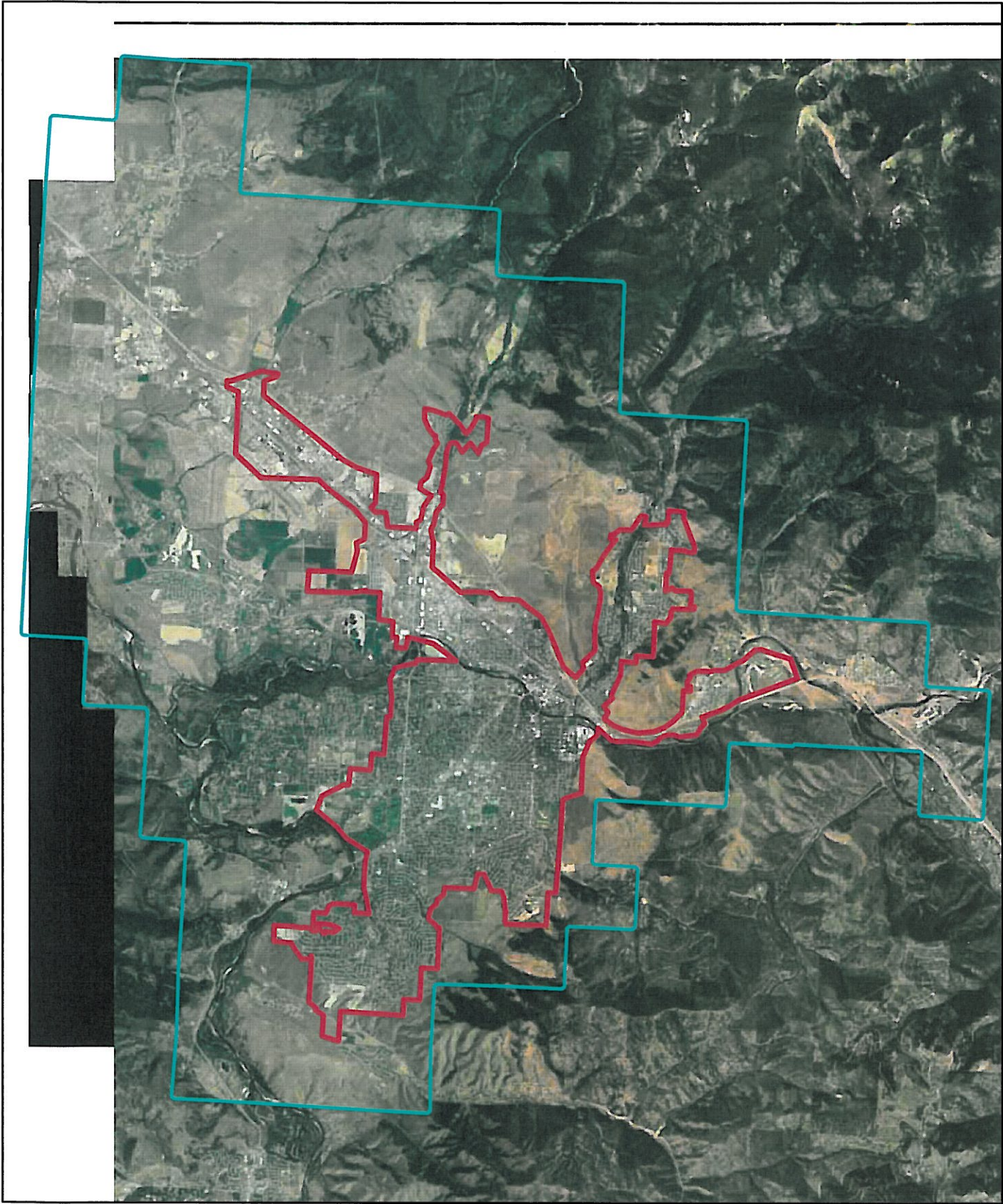
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By:


Ross D. Miller

Exhibit A



2

1 in = 2 miles

Legend

- Place of Use
- Service Boundary